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NO. 80-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BULLARD INDEPENDENT SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

JAMES N. BROWN,
Respondent.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES CITED

I. Reported Decisions ii

II. Other Authorities ii

CONSTITUTIONAL AND STATUTORY PROVISIONS iii

STATEMENT OF THE CASE 1

ARGUMENT

I. Respondent's Comments are Constitutionally Protected 2

II. The "Even Partially" Instruction Under the Circumstances is Harmless Error 8

PRAYER 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES CITED

I.
REPORTED DECISIONS

Chitwood v. *Feaster*, 468 F.2d 359 (4th Cir. 1972)	4
City of Madison Joint School District No. 8 v. *Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976)	5
First Virginia Bankshares v. *Benson*, 599 F.2d 1307 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978)	8
Garrison v. *State of Louisiana*, 379 U.S. 64 (1964)	5
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 (1979)	2, 4, 5, 7
Mt. Healthy City Board of Education v. *Doyle*, 429 U.S. 274 (1977)	3, 5, 8, 9
Pickering v. *Board of Education*, 391 U.S. 563 (1979)	2, 3
Schneider v. *City of Atlanta*, 628 F.2d 915 (5th Cir. 1980)	3n

II.
OTHER AUTHORITIES

Emerson, T., *The System of Freedom of Expression* 570-581 (1970)	5

Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District*, 1979 S.Ct.Rev. 243-249 ..... 5n

Vernon's Ann. Civ. St. art. 5154c § 6 5

III.
CONSTITUTIONAL AND STATUTORY PROVISIONS

A. The First Amendment to the United States Constitution, in pertinent part, provides:

> "Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

B. The Fourteenth Amendment to the Constitution has been interpreted to make the First Amendment applicable to the states. It reads:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

C. 42 U.S.C. § 1983 provides as follows:

> "Every person who, under color of any statute... of any State or Territory, subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privi-

leges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

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STATEMENT OF THE CASE

James Brown brought this action under 42 U.S.C. § 1983 against various state officials including his principal, superintendent and trustees of the Bullard Independent School District. Brown alleged that the defendants placed him on probation, giving him the

first negative evaluation of his teaching career. They then recommended that he not be rehired and voted not to rehire him. All of these adverse actions were taken because of his exercise of speech protected by the first amendment (Tr. 78-82).

The case was tried before a jury. A verdict for Brown was entered in response to four special interrogatories. Basically, the jury found that: (1) the non-renewal violated Brown's first amendment rights; (2) Irby and Coffey were not entitled to "good-faith" immunity; (3) the trustees voting not to renew the contract were not entitled to the "good-faith" immunity; and (4) Irby and Coffey acted with malice toward Brown. The jury awarded damages to Brown.

Respondent strongly contests the statement of facts set forth in the Petition for Writ of Certiorari and has incorporated his version of the facts in the Argument.

ARGUMENT

I. RESPONDENT'S COMMENTS ARE CONSTITUTIONALLY PROTECTED.

The application for writ of certiorari should be denied because dispositon is controlled by the legal principles established in *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979). Whether respondent's comments are constitutionally protected involves an application of the balancing test set forth in *Pickering* v. *Board of Education*, 391 U.S. 563 (1979). "The problem in any case is to arrive at a balance between the interests of

the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* at 568.

Although the issue of whether Brown's comments are constitutionally protected was probably not properly preserved [1], respondent suggests that the trial court correctly determined that Brown's speech is protected. The trial court instructed the jury that the private comments made by Brown "which related to the conditions of his employment, and remarks ... made at a faculty meeting on November 18th, 1976 ... are protected First Amendment activities" (Tr. 522). Over respondent's objection [2], the trial court submitted to the jury not only the *Mt. Healthy* defense issues, but also the disruption issues.

> If you find that the remarks of the Plaintiff at the November 18th, 1976 faculty meeting were directed at the judgment of Plaintiff's superior which would disturb the harmony in the administration and teaching staff of the School District, then such remarks do not require the retention of the teacher under the guise of freedom of speech.

[1] Petitioner objected on *Mt. Healthy* grounds to the instruction: "[T]here is no evidence ... that such ... activities in the absence of sufficient evidence ... were the motivating cause of the conduct" (Tr. 537). Petitioner did not object on the grounds that the comments were not protected speech.

[2] Respondent assumes that the application of the *Pickering* balancing test is a question of law. *See Schneider* v. *City of Atlanta*, 628 F.2d 915, 918 (5th Cir. 1980). Respondent objected to submission of the disruption issue to the jury (Tr. 534).

> However, in order to justify a decision not to renew a teacher's contract based upon the derisive [*sic*] effect of his speech, you must first decide if the speech had such an effect on the harmony of the school. If you find that Mr. Brown's speech adversely effected the harmony of the Bullard Independent School District, you may weigh that against the public interest served in allowing free debate (Tr. 524-525).

Thus the petitioner's claim that Brown's comments were nothing more than "bickering and running disputes" as discussed in *Chitwood* v. *Feaster,* 468 F.2d 359 (4th Cir. 1972), is a factual issue which was rejected by the jury. Likewise petitioner's claim that Brown's faculty meeting remarks were "made from a personal stance for perculiarly [*sic*] personal reasons with an isolated personal target (the superintendent) as its object" was impliedly rejected by the jury. (Petition for Writ of Certiorari 14).

Whether the faculty meeting comments are protected involves an evaluation of the content of the speech as well as the "manner, time, and place in which it was delivered." *Givhan* at 415 n.4. Brown's remarks at the faculty meeting dealt with the teacher evaluation policy utilized by the administration. The comments were made up at a meeting in which teachers were encouraged to "speak their peace" (Tr. 266).

Moreover the district's evaluation policies were a public issue. The superintendent testified that one

of his primary objectives was the development of a teacher evaluation policy (Tr. 239). Discussions regarding the terms and conditions of employment of public employees have traditionally been protected. *See City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976). It is significant that at the time of the faculty meeting, Brown had not received a negative teacher evaluation. His comments, then, could *not* have been personally defensive or motivated. His remarks were on behalf of and for the benefit of his co-employees. Such activity by public employees in Texas has been accorded statutory protection. Vernon's Ann.Civ.St. art. 5154c §6.

Each of the other comments made by Brown, in private conversations with Irby or Irby and Coffey, in balance and in context, is reasonable in manner, time, and place of presentation. One of the most widely recognized areas of protected activity is the right to speak and petition the government for redress of grievances. *See* Emerson, T., *The System of Freedom of Expression* 570-581 (1970). If anything, a citizen has the right to criticize a government official's conduct of the public's business. *Garrison* v. *State of Louisiana*, 379 U.S. 64 (1964). Brown then as a citizen had the right to comment upon[3] the actions and policies of the government official delegated the responsibility by the Board of

[3] Some commentators suggest that the public employees' right to criticize may be founded in an expanded notion of academic freedom. *See* Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District*, 1979 S.Ct.Rev. 243-249.

Education of making day-to-day decisions concerning the public's business. The superintendent even conceded that Brown's criticism of him for showing favoritism toward his own daughter was justified. [4] With regard to the Dairy Maid incident, Brown explained that the incident merely showed a lack of effective communication between the superintendent and his principals (Tr. 86-88). Brown also criticized Irby for living at a country club rather than residing in the rural community where he was employed (Tr. 111). Finally, Brown called Irby an "autocrat" in an admittedly heated discussion which occurred after Irby had placed Brown on probation the day after Brown's faculty remarks (Tr. 121, 122).

In context, each of these remarks and comments reflects Brown's concern as a citizen for the promotion of egalitarian values and norms in the public school system at Bullard. Although petitioner continues to claim that the remarks had the effect of disrupting the harmony of the school, there is abundant evidence to the contrary. In considering whether the remarks and comments posed a threat to internal discipline or harmony among co-workers or jeopardized a close working relationship with an immediate supervisor, the jury was required to examine the context of each remark.

The comments did not adversely affect the school's performance of a public service because they were

[4] Irby had his own daughter and her best friend excused from Brown's class in order to participate in a private show by a magician on school premises. After the show the two children, predictably excited, disturbed the class (Tr. 83-85).

delivered in a manner which posed no threat to internal discipline. All but the remarks regarding the teacher evaluations were made privately by Brown to Irby or Irby and Coffey so the teachers had no reason to know about most of Brown's remarks. When Brown indicated disapproval of Irby's residence and lack of communication with the principal, it was during a private conversation in Irby's office. In fact, Irby specifically asked Brown for his opinion of Irby's administration and solicited Brown's opinion on how to improve it (Tr. 110). Brown's criticisms regarding the magician were made privately to Irby and Coffey (Tr. 85). Brown's criticism of the bus route was made privately to Irby (Tr. 81-82).

Finally, Brown's criticisms should not have jeopardized his working relationship with his supervisors. Irby encouraged Brown to comment on his administration during their May 1976 meeting (Tr. 110). Irby encouraged teachers to speak out during faculty meetings (Tr. 266). Irby told his teachers that he maintained an open door policy (Tr. 94). Once the administration opened its door, it could not object that an employee had a poor attitude simply because he voiced criticisms.

In sum, Brown's criticisms were all made in an appropriate time and place and in a reasonable manner. His criticisms seem especially reasonable when one considers that the court in *Givhan* was willing to consider Givhan's speech as being potentially protected under the first amendment even though Givhan's speech was accompanied by such potentially harmful activity as "downgrading" the

papers of white students, walking out of a meeting about desegregation and attempting to disrupt it by blowing automobile horns, threatening not to work and protecting a student during a weapons shakedown by concealing the student's knife.

II. THE "EVEN PARTIALLY" INSTRUCTION UNDER THE CIRCUMSTANCES IS HARMLESS ERROR.

The submission of the "even partially" instruction must be viewed in light of the entire charge, the allegations in the complaint, the evidence presented, and the arguments of counsel to determine whether the jurors were misled and misunderstood the issues. *First Virginia Bankshares* v. *Benson,* 599 F.2d 1307 (5th Cir. 1977), *cert. denied,* 435 U.S. 952 (1978).

The charge as a whole complies with *Mt. Healthy City Board of Education* v. *Doyle,* 429 U.S. 274 (1977). Therein the Court set out the respective burdens of the parties:

> Initially . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" — or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemploy-

> ment even in the absence of the protected conduct. 429 U.S. at 287.

Herein the trial court instructed the jury as follows:

> The effect of this protection is that the Bullard Independent School District, its Superintendent or its junior high Principal cannot legally retaliate in any way against James Brown for the exercise of these protected First Amendment rights by placing him on probation or refusing to renew his employment contract in retaliation for Mr. Brown's exercise of his protected First Amendment rights. In other words, if (the defendants) took actions which were taken because James Brown exercised his First Amendment activities or even partially for that reason, the Defendants acted illegally.
>
> If James Brown's actions or statements in connection with his protected First Amendment activities were a substantial or motivating factor in any of the decisions... then the Defendants acted illegally and contrary to the Constitution of the United States. The burden of proof in this connection is on the Plaintiff... to prove his allegations to you by a preponderance of the evidence.
>
> On the other hand, if (the defendants) can establish that the action which they took with reference to James Brown would have been taken in any event; that is, even if he had

> never made those remarks on November 18th, 1976, or had any conversations regarding his employment with Mr. Irby; then there is no violation of the law. In this connection, however, the burden of proof is on the Defendants to prove by a preponderance of the evidence that they would have acted just as they did had James Brown never engaged in protected First Amendment activities that I have listed to you in this Charge (Tr. 522-524).

Petitioner argues that inclusion of the language "even partially" and "illegally" set too low a level of proof resulting in fundamental error. The record herein simply does not support petitioner's position. It was respondent's position throughout the trial that the sole basis for his non-renewal and probation was his protected activities, not his teaching abilities or performance of duties.

The court explained the contentions of respondent as follows:

> Specifically, Mr. Brown contends that remarks he made at a meeting of November 18th, 1976, and remarks he made to Mr. Irby prior to that time which related to conditions of employment, were the motivating factor behind the ultimate decision not to renew his contract (Tr. 520).

The evidence amply supports respondent's theory of the case. Irby testified that after the faculty meeting he met with his two principals. He asked the principals if Brown would make a good teacher.

"Both of them said no, he's against the administration. He's fighting us tooth and nail." Then Irby said that "I think maybe what we ought to do is place him on probation so that he will realize what we're really trying to do..." (Tr. 303). Irby also testified that Brown's actions during the faculty meeting prompted him to place Brown on probation because "it reminded me... that this is the man I had talked to much earlier, and I needed to and had told him so that I would evaluate him in the fall..." (Tr. 305).

Witness Parmley testified that Irby told him that "we cannot tolerate this type of action like we had at the faculty meeting..." (Tr. 208). Brown testified that after the faculty meeting he was called in for a conference by Irby who stated: "Mr. Brown, you've been called in because of the outburst in yesterday's faculty meeting." Irby also told Brown during that conference that he was going to be placed on probation because of the remarks (Tr. 118).

The district's primary defense was that Brown opposed the administration (Tr. 303) and was defiant of authority (Tr. 286). All of the trustees cited Brown's negative attitude as the main reason for the non-renewal (Tr. 374, 413, 415, 425). The district produced considerable testimony that Brown's teaching was deficient and that he failed to maintain discipline and control. Brown, however, produced substantial and persuasive testimony to the contrary.

Prior to the faculty meeting, Brown had not received any negative evaluations or any significant

criticisms of his teaching performance (Tr. 63, 73, 76, 78, 468). No written complaints had been placed in his file prior to the faculty remarks (Tr. 300, 335). Brown testified that he was very familiar with the class material and planned daily (Tr. 62). He also testified that he taught the same courses and the same material all three years (Tr. 62-63). He used teaching aids when necessary and maintained bulletin boards and posters (Tr. 473).

Concerning complaints by parents about his teaching, Irby told Brown at the May 1976 evaluation that he had received no more complaints about Brown than any other teacher (Tr. 187). Two teachers testified in support of Brown. Nicholson and Jeeter testified that Brown's students were well prepared for seventh grade work (Tr. 451, 459). Neither ever received any complaints from their students about Brown and both considered Brown to be proficient (Tr. 451, 463).

Thus the evidence presented supports an implied finding that the protected activity rather than alleged teaching deficiencies was a substantial or motivating factor in the personnel action taken against Brown.

The arguments of counsel similarly amplify the instructions of the court. In the opening statement Counsel for respondent argued that:

> . . . we submit to you that Mr. Brown was placed on probation by Mr. Irby and Mr. Coffey in November of 1976, that he was given a negative evaluation at that time, that he was given a

> negative evaluation in February of 1977, that he was recommended not to be rehired in March of 1977, and in fact was not rehired in March of 1977, for impermissible reasons. He was not rehired and all of those adverse actions were taken against Mr. Brown we submit, and we think that the evidence will prove to you, because of his exercise of his First Amendment Right — freedom of speech (Tr. 30-31).

Counsel for petitioners contended throughout its argument that the various comments made by Brown in private conversations and at the faculty meeting indicated that Brown had a "deep seated", "almost irrational", resentment of the administration (Tr. 498). Further petitioners' counsel argued that Brown was "confronting his boss" (Tr. 500) and had "attacked Phil Irby" (Tr. 501).

Counsel then tried to minimize the importance of Brown's remarks during the faculty meeting by arguing that:

> . . . I know that a man like Mr. Irby here who has heard this man call him an autocrat, who has heard this same man accuse him of all sorts of misdeed, and he is an employee of his, right there in that little School District, is not going to take any drastic action solely because of some remark at a faculty meeting that the administration was nit-picking (Tr. 504).

In rebuttal, respondent's counsel closed with these comments:

> You've heard Mr. Brown a lot, and if you really feel that Mr. Brown is that kind of a man, and that he had this deep seated anti-authoritarianism, that deep seated resentment that Defendants would have you believe, then we concede we shouldn't get a judgment, because that's the issue in this case. The issue is not Mr. Brown's resentment. The issue is who is telling the truth here (Tr. 513).

During the rebuttal phase of the trial, Brown responded to the many claims made against him by the defendants as follows:

> All the kids — of course, students that age, 9 or 10 years old, sixth grade students, have a tremendous sense of fairness, and if you're not fair to them, they're going to know it. And my students would tell me, and as far as discipline, I think they all understood that there were certain limits that they could take, and if they went too far, well, they knew that I'd get the board and bust them with it... but I don't believe that as a teacher you are there to tell so much, as you are there to have them discover. That's kind of my idea about it. Sometimes my room was noisy I'll agree, but it was never out of control (Tr. 473).

So, in the final analysis, an East Texas jury of peers made some credibility judgments and resolved conflicting testimony in Brown's favor. It was this process, we submit, not the court's "even partially" or "illegal if taken" submissions which carried the case for Brown.

PRAYER

Therefore respondent prays that the petition for writ of certiorari be denied or in the alternative, that judgments of the court below be affirmed and that respondent recover his costs and attorneys' fees and for such other and further relief to which he may justly be entitled at law or in equity.

Respectfully submitted,

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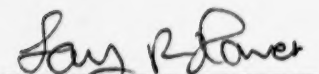
By: 
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ON THE PAPERS:
Margaret D. Burkhart

CERTIFICATE OF SERVICE

I, Larry R. Daves, hereby certify that a true and correct copy of the foregoing has been deposited in the United States Mail, postage prepaid, on this the 26th day of June, 1981, to: Michael A. Hatchell, Esq., P. O. Box 629, Tyler, Texas 75710.

By: Larry R. Daves
Larry R. Daves